



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 16, 2022

IN THE MATTER OF:

Appeal Board No. 624975

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 624974, 624975 and 624976, the claimant appeals from the decisions of the Administrative Law Judge filed July 11, 2022, insofar as the decisions sustained the initial determinations holding the claimant ineligible to receive benefits, effective July 6, 2020 through January 17, 2021, on the basis that the claimant was not totally unemployed, as modified to be effective August 3, 2020 through September 13, 2020 for two days per week, September 14, 2020 through January 17, 2021 for four days per week; sustained the initial determination holding the claimant ineligible to receive benefits, effective January 18, 2021 through April 4, 2021; sustained the initial determinations charging the claimant with an overpayment of \$3,419 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4),

\$6,000 in Federal Pandemic Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$6,838 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), as modified in accordance with the decision; sustained the initial determination reducing the claimant's right to receive future benefits by 312 effective days and charging a civil penalty of \$2,438.55 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified in accordance with the decision; and referred the amounts of overpayment, forfeit penalty and civil penalty to the Department of Labor for recalculation.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has worked part time as a porter for a fitness center since July 2019. He typically works four hour shifts on a varied schedule earning \$16 per hour. The claimant can work additional shifts if he desires.

The claimant filed an original claim effective March 30, 2020, establishing a weekly benefit rate of \$263.00. For the weeks ending August 9, August 16, August 23, August 30, September 6, and September 13, 2020, the claimant worked two days per week. For the remainder of the period in weeks ending September 20, 2020 through January 17, 2021, the claimant worked six to seven days per week. Starting January 18, 2021, the claimant worked 28 hours each week in the weeks ending January 24, 2021, and January 31, 2021, and 24 hours in the week ending February 7, 2021. For weeks ending February 14, 2021 through March 28, 2021, the claimant worked in excess of 30 hours each week. For week ending April 4, 2021 the claimant worked 28 hours.

The claimant was aware that he was required to report all of the work he did. His son helped him with certifying by computer. When the claimant certified for benefits each week during the period of July 6, 2020 through January 17, 2021 he was asked how many days he had worked during the week for which he was certifying. Each week he certified he worked "zero" days during the prior week because he was only working part time. When the claimant certified for benefits each week during the period of January 18, 2021 through April 4, 2021, the claimant certified that he worked "zero" hours each during the period in issue because he was working less than 40 hours. As a result of the claimant's certifications, he received \$3,419 in regular benefits, \$6,000 in FPUC benefits, \$6,838 in PEUC benefits and \$1,800 in LWA benefits.

OPINION: The credible evidence establishes that for the period of August 3, 2020 through January 17, 2021 the claimant worked two days each week for the weeks ending August 9, August 16, August 23, August 30, September 6, and September 13, 2020; and six to seven days per week for the week ending September 20, 2020 through the week ending January 17, 2021. In this regard,

the employer's payroll records support the periods of the claimant's employment, number of hours and days worked during the period in issue. By contrast, the claimant often did not recall the number of days he had worked during the weeks at issue. We therefore credit the employer's detailed documents over the claimant's testimony. For the weeks ending August 9, August 16, August 23, August 30, September 6 and September 13, 2020, as the claimant worked two days per week but certified that he had worked zero days, he was overpaid two days of benefits, amounting to \$131.50, while he was also eligible for two days of benefits for each of those weeks. Pursuant to federal law, since the claimant is eligible for more than \$100 of regular benefits for these weeks, he is also eligible for LWA benefits during this period. However, as the claimant worked four or more days each week from September 14, 2020 through January 17, 2021, all of the benefits he received for that period were overpaid. Consistent with federal law, FPUC, PEUC and LWA benefits that were overpaid to the claimant from September 14, 2020 through January 17, 2021 are recoverable.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1. For the purpose of calculating the number of effective days in a week to determine a claimant's weekly

benefit entitlement in accordance with Labor Law § 590, a claimant shall

experience a "day of total unemployment" or "full day of total unemployment" on each day that is not a day of employment.

2. The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included

per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. For example, a claimant who works a total of 3 hours in a week shall be deemed to have engaged in zero days of employment, a claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and

a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

Under the new rule, part-time workers like the claimant may be eligible to collect partial benefits even though their hours of work extended over the course of four or more days. In each of the weeks ending January 24, January 31, and April 4, 2021, the claimant worked 28 hours. In the week ending February 7, 2021, he worked 24 hours. Under the new regulation, as the claimant worked 21 - 30 hours in each of those four weeks, he is deemed to have worked three days. As the claimant certified that he had worked zero hours each week, and therefore had worked zero days each week, he was overpaid three days of benefits and was eligible to receive one day of benefits, or 25 percent of his weekly benefit amount in each of those weeks. Additionally, since the claimant is eligible for \$1 of benefits during these weeks, consistent with federal law he is also eligible for FPUC benefits for these weeks. Since the claimant worked in excess of 30 hours during the weeks ending February 14, February 21, February 28, March 7, March 14, March 21 and March 28, 2021, he is deemed to have worked four or more days and is therefore not eligible for benefits.

The credible evidence further establishes that the claimant certified to the Department of Labor that he worked "0" days each week from the week ending July 12, 2020 through January 17, 2021. The claimant contends that he certified to the correct number of days worked through January 17, 2021 and that he certified to the correct number of hours of work for the period of January 18, 2021 through April 4, 2021. Although the claimant testified that he certified this way because he was only working part time, the claimant knew he was working. However, we find that since the claimant did not work for the period of July 6, 2020 through August 2, 2020, his certifications were accurate and not willful misrepresentations. For the period of August 3, 2020 through January 17, 2021 and January 18, 2021 through April 4, 2021, the claimant knew he had worked or was deemed to have worked at least one day each week. His certifications that he had worked zero days were factually false and constitute willful misrepresentations to obtain benefits. Accordingly, the overpaid regular unemployment insurance benefits are recoverable and the claimant is subject to forfeit penalties and monetary penalties.

The amounts of the recoverable overpayments, forfeit penalties and monetary

penalties are referred to the Department of Labor for recalculation in accordance with this decision.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 624974, the initial determinations holding the claimant ineligible to receive benefits, effective July 6, 2020 through January 17, 2021, and January 18, 2021 through April 4, 2021, on the basis that the claimant was not totally unemployed, are modified in accordance with this decision and, as so modified, are sustained.

In Appeal Board No. 624975, the initial determinations charging the claimant with an overpayment of \$3,419 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), \$6,000 in Federal Pandemic

Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$6,838 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), are modified in accordance with this decision and, as so modified are sustained.

In Appeal Board No. 624976, the initial determination reducing the claimant's right to receive future benefits by 312 effective days and charging a civil penalty of \$2,438.55 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified in accordance with this decision and, as so modified is sustained.

The amounts of the recoverable overpayments, forfeit penalties and monetary penalties are referred to the Department of Labor for recalculation in accordance with this decision.

The claimant is denied benefits with respect to the issues decided herein. (Al reclamante se le niegan beneficios con respecto a los temas decididos en el presente.)

MICHAEL T. GREASON, MEMBER